Filed 12/18/08 Aldridge v. LA Cty. MTA CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ARNULFO ALDRIDGE, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	B202578 (Los Angeles County Super. Ct. No. BC 361291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed.

Arnulfo Aldridge, in pro. per., for Plaintiff and Appellant.

Raymond G. Fortner, Jr., County Counsel, and Richard P. Chastang, Deputy County Counsel, for Defendant and Respondent.

* * * * * *

Arnulfo Aldridge, acting in propria persona here and in the court below, appeals from a judgment dismissing his action after the court sustained, without leave to amend, respondent Los Angeles County Metropolitan Transportation Authority's (MTA) demurrer to his third amended complaint. Appellant's sole contention is that the trial court erroneously and prejudicially denied him the constitutional right to a jury trial. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

Tracing the tortuous history of this action, we note that appellant had four opportunities to state a claim. Even though the trial court had no obligation to extend appellant special consideration because of his in propria persona status, the court exercised extraordinary patience and restraint in allowing appellant to make several attempts to state a viable cause of action.[1]

Appellant filed his original complaint on November 2, 2006. He used a printed Judicial Council form for contract complaints to set forth a claim against MTA. The civil case cover sheet referred to "five" causes of action, but the complaint itself appeared to contain only a single cause of action. The original complaint claimed general negligence against MTA with respect to an accident occurring on September 19, 2001, at Willowbrook and Elm Street. Incorporated by reference was appellant's declaration stating he was a passenger in an MTA vehicle that was involved in a head-on collision on that date.

Appellant also stated in a declaration attached to the original complaint that his injuries were diagnosed on the day of the accident. He stated he was "checked" by MTA at the Long Beach Medical Center on September 19, 2001, and was determined to have "severe neck and back strain." He further stated he was checked by a military flight surgeon on October 12, 2001, and was found to have a "serious neck and back injury due to severe swelling." Appellant attached and incorporated a letter from MTA, dated September 14,

---

[1] A party acting in propria persona is held to the same standard as one with legal counsel. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984 ["mere self-representation is not a ground for exceptionally lenient treatment"].)

2005, showing he was medically separated from his employment at MTA. In addition, appellant attached a right to sue letter from the state Department of Fair Employment and Housing (DFEH) issued on November 7, 2005, although appellant asserted no Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.) claim in his complaint.

MTA filed a general and special demurrer to the entire complaint and the trial court sustained the demurrer with leave to amend. Appellant then attempted without success to plead a cause of action three more times, as follows.

Appellant filed a first amended complaint, again on a Judicial Council contract complaint form, to which MTA demurred. On the eve of the demurrer hearing, appellant submitted an untimely opposition and a proposed second amended complaint. The trial court took the demurrer to the first amended complaint off calendar as moot. The court indicated that its tentative ruling had been to sustain the demurrer with "final" leave to amend.

The trial court orally addressed a number of defects in appellant's first amended complaint. The court pointed out that appellant omitted the DFEH letter in the amended complaint and failed to include "allegations as to cause of liability, when it occurred, or even when the causes of actions were being pled."[2] The court briefly reviewed the proposed second amended complaint and told appellant the pleading still appeared to be lacking in essential elements, even though appellant had added some allegations. MTA asked the court to order appellant to file a third amended complaint forthwith without requiring MTA to file another demurrer. The court denied MTA's request stating it wished to have the

---

[2] At this hearing, the court attempted to clarify the factual circumstances of appellant's claim. Appellant informed the court he was working for MTA, as a passenger riding a maintenance vehicle, when the driver lost control and collided with a parked vehicle. He mentioned having a problem securing benefits from MTA through workers' compensation, stating "there was a constant delay of over three years *in the workers' comp*, and no result. *We could not resolve it through workers' comp* for some reason. [¶] . . . [¶] . . . They delayed it for three years. And I needed the surgery three years ago. *They never responded*." (Italics added.) MTA's counsel informed the court that MTA had denied appellant surgery based upon an examination by an independent medical examiner and that appellant was medically separated from MTA under a one-year medical separation rule.

benefit of MTA's demurrer so that the court could "tell [appellant] specifically what needs to be changed."

Appellant's second amended complaint attempted to state six causes of action: (1) discrimination based upon physical disability, (2) harassment based on physical disability, (3) retaliation for filing a workers' compensation claim, (4) violation of public policy, (5) negligence, and (6) intentional infliction of emotional distress. Appellant alleged he was injured in a traffic accident on September 18, 2001, during the course of his usual and customary activities as an employee of MTA. He commenced treatment following a request for workers' compensation. He was found to be temporarily totally disabled and currently remains disabled.

Appellant alleged he needed back surgery to correct his injuries, but MTA either failed to approve or delayed in approving the surgery. As a result of the delay, appellant alleged he suffered emotional distress. Appellant also alleged that MTA terminated his employment because of his physical disability and because he filed a workers' compensation claim.

As the trial court requested, MTA demurred to the second amended complaint and listed the aspects in which the pleading was deficient. The court sustained the demurrer to appellant's nonstatutory claims for negligence and intentional infliction of emotional distress without leave to amend.[3] As to appellant's remaining FEHA claims, the court granted leave to amend and explicitly indicated the manner in which appellant should amend his pleading.[4] In granting leave to amend the statutory claims, the trial court stated,

---

[3] The court agreed with MTA's contention that appellant's common law claims were barred for failure to comply with the California Government Claims Act (Claims Act; Gov. Code, §§ 905, 911.2, 915 and 945.4; see *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

[4] The court's order stated, in part: "MTA, as a governmental entity, is entitled to specific factual allegations establishing that each element of the relevant cause of action has been pled. [Citations.]" The court further noted: "The [c]ourt has twice commended this to the attention of [appellant] . . . , but notes that there is a persistent failure to allege (for example) . . . the dates when he applied for Worker's Compensation (which is the alleged

"[t]he [c]ourt, finding that [appellant] has been given several chances to amend, with specific instructions each time, and [appellant having] failed to do so, the [c]ourt grants a **final** leave to amend in accordance with its instructions . . . ."

Appellant filed a third amended complaint. He reasserted claims for (1) discrimination based on physical disability, (2) harassment based on physical disability, (3) retaliation for filing a workers' compensation claim and (4) violation of public policy. MTA once again filed a general and special demurrer. The court determined that, aside from minor formatting corrections and a notation regarding the date of the initial injury, the third amended complaint was "virtually identical" to the second amended complaint. The court therefore sustained MTA's demurrer to the third amended complaint without leave to amend and ordered the case dismissed.

In so ruling, the trial court stated: "Given the clear and unambiguous instructions of the [c]ourt, this [failure to fix the problems] is unacceptable. In the situation where a party is given specific leave to amend and fails to do so, it is within the court's authority to deny further leave to amend. [Citations.]"

This timely appeal followed.

---

trigger for his FEHA claim) . . . and the dates when he was turned down for surgery. The serious statute of limitations problems presented by this complaint require these date-specific allegations."

The court further instructed appellant that "[t]he [c]ourt also requires allegations of specific fact surrounding [appellant's] termination, in order to clarify the allegations in the 'medical separation' letter attached to the original complaint. The [c]ourt also requires that [appellant] plead in conformity with the declaration appended to the original complaint in this matter, or plead a satisfactory explanation for any inconsistencies. [Citation.] [¶] Further, the [c]ourt notes that the allegations regarding the discrimination claim and the harassment claim are identical [citation]. However, discrimination and harassment are different claims . . . ."

The court listed each deficiency and provided appellant with case citations to help guide appellant in properly pleading the elements of each cause of action.

STANDARD OF REVIEW

The standard of review of an order of dismissal following the sustaining of a demurrer is well established. We view the demurrer as admitting all material facts properly pleaded, together with matters subject to judicial notice, but not deductions, contentions, or conclusions of law or fact. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We give the complaint a reasonable interpretation, reading the complaint as a whole and its parts in context. (*Blank v. Kirwan, supra*, at p. 318.) We may also consider documents attached to the complaint as exhibits. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 714; see 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 90, p. 361.) We review the order de novo, exercising our independent judgment whether the complaint states a cause of action as a matter of law. (See *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) We affirm the sustaining of a demurrer if the trial court's decision was correct under any theory. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808.) When the demurrer is sustained without leave to amend, we review the ruling for abuse of discretion. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

DISCUSSION

1. Deprivation of Jury Trial

Appellant contends he was deprived of his constitutional right to a jury trial on the issue whether he was wrongfully terminated and that he alleged sufficient facts to maintain an action for discrimination, harassment, retaliation and violation of public policy. We disagree.

A demurrer raises an issue of law as to the legal sufficiency of the pleading, which presents an issue of law for the court, not a question of fact for the jury. (See *Kurlan v. Columbia Broadcasting System* (1953) 40 Cal.2d 799, 806-807; *Palmer v. Metro-Goldwyn-Mayer Pictures* (1953) 119 Cal.App.2d 456, 460 (*Palmer*); see also *Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 791.) As such, the sustaining of a demurrer without leave to amend

does not deprive a plaintiff of the constitutional right of trial by jury if the plaintiff has stated no legally sufficient cause of action. (*Palmer*, *supra*, at p. 460.)

The allegations upon which appellant relied to support all of his causes of action amount to six basic facts: (1) he was employed by MTA; (2) he was injured in a vehicle accident during work hours; (3) he filed a workers' compensation claim based on his injuries; (4) he required spinal surgery; (5) MTA failed to authorize the surgery; and (6) MTA terminated his employment. These allegations are insufficient to state any cause of action under FEHA.

A. Discrimination

Appellant asserts a claim for discrimination based on physical disability in his first cause of action. In general, to state a cause of action for discrimination under FEHA, a plaintiff must allege: (1) he was a member of a protected class, (2) he was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, and (4) some other circumstance that suggests discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)

In his claim for discrimination, appellant asserts FEHA prohibits MTA from "harassing" employees on the basis of physical disability. He alleges MTA violated FEHA's provisions by subjecting appellant to "harassment" by (1) failing to approve required surgery, and (2) discriminating against him by terminating him from employment because of his physical disability and for filing a workers' compensation claim. Aside from mixing "harassment" with "discrimination," appellant's allegations fail to state any claim for unlawful discrimination.

Government Code section 12940 prohibits an employer from discriminating against an employee "in *terms, conditions, or privileges* of employment" because of an employee's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. (Italics added; see *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.) Appellant alleged MTA discriminated against him by failing to approve his spinal surgery and terminated him. Such a failure, as a

matter of law, does not relate to "terms, conditions or privileges" of employment and therefore cannot be deemed to be an adverse employment action.[5]

Additionally, a claim for discrimination under FEHA requires a plaintiff to show he was performing competently in his job. (*Green v. State of California* (2007) 42 Cal.4th 254, 265-266 ["a plaintiff must prove that he or she can perform the essential functions of the job in order to prevail on a claim under the FEHA. . . . [I]n disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job with or without reasonable accommodation. [¶] . . . [¶] . . . FEHA has not imposed liability on an employer if an employee, even a disabled employee, could not perform his or her duties with or without reasonable accommodation"]; see Gov. Code, § 12940, subd. (a)(1), (2).) Appellant alleges that he was "determined to be temporarily totally disabled, [and] *currently remains disabled*."[6] (Italics added.) Therefore, appellant cannot show one of the essential elements for a claim of discrimination under FEHA. Because it is clear appellant has no claim for discrimination under FEHA, we need not go into additional aspects in which appellant's allegations are wanting.

---

[5] The failure to approve appellant's surgery relates to his workers' compensation action, which is not the subject of this action and which most probably falls within the exclusive jurisdiction of workers' compensation. The workers' compensation appeals board's exclusive jurisdiction extends to all rights and liabilities arising out of or incidental to the recovery of compensation. (Lab. Code, § 5300, subd. (a).) That jurisdiction broadly includes a claim for unreasonable withholding or delay and resultant emotional distress. (*Schlick v. Comco Management, Inc.* (1987) 196 Cal.App.3d 974, 982; see also *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 817; *Phillips v. Crawford & Co.* (1988) 202 Cal.App.3d 383, 387.)

[6] Appellant attached to his third amended complaint MTA's September 2005 letter, which informed him that "our records indicate that you last performed services for [MTA] on September 20, 2001. Medical documentation submitted to the MTA indicates you have been declared a qualified injured worker and that *you cannot return to work in your usual and customary occupation*." The letter states appellant was qualified to participate in an "ADA [Americans with Disabilities Act, 43 U.S.C. § 12101 et seq.] interactive process," which would have afforded appellant to pursue other job opportunities but he "did not want to continue with the ADA interactive process." (Italics added.)

B. Harassment

In his second cause of action, appellant asserts MTA harassed him based on his physical disability. To plead a claim for harassment under FEHA, a plaintiff must plead and prove: (1) he belongs to a protected group; (2) he was subjected to harassment; (3) the harassment was based upon being a member of the protected group (i.e., race, nationality, etc.); and (4) the harassment was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.) The employee is required to show a "concerted pattern" of harassment of a "repeated, routine, or generalized nature"; harassment that is "'occasional, isolated, sporadic, or trivial'" is insufficient. (*Fisher v. San Pedro Peninsula Hospital*, *supra*, at p. 608; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 131.)

Appellant fails to show the claimed "harassment" in this case was part of a "concerted" pattern or that it was of a "repeated, routine or generalized nature." A failure to approve surgery is a single event in the nature of conduct that is "isolated" or "sporadic," and thus by definition is not "pervasive" or "abusive" or of such enormity so as to alter the conditions of employment.

There was no error in sustaining the demurrer to the claim for harassment.

C. Retaliation

In his third cause of action, appellant claims retaliation for filing a workers' compensation claim. We recognize that, in a proper case, an employee may bring a FEHA claim for retaliation as a result of filing a workers' compensation claim. (See *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158 [Lab. Code, § 132a is not exclusive remedy for disability discrimination].) However, not every occurrence of disability discrimination in violation of Labor Code section 132a gives rise to a FEHA claim. (*City of Moorpark*, *supra*, at p. 1158.) An employee establishes a claim for unlawful retaliation under FEHA by showing (1) he engaged in an activity protected by FEHA, (2) his employer subsequently took adverse employment action against him, and (3) a causal

connection between the protected activity and the adverse employment action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.)

To the extent that appellant alleges MTA retaliated against him due to his disability and filing of a workers' compensation claim by not approving his surgery, any such failure, as noted, does not relate to the terms, conditions or privileges of employment.

Insofar as appellant alleges MTA retaliated against him by terminating his employment, MTA's September 2005 letter indicates he was medically separated from his employment because he had not worked for MTA for more than four years since his injury, he failed to participate in an ADA interactive process to obtain alternate employment, and he failed to attend a pre-medical separation hearing to determine the status of his employment.

By attaching the MTA letter to his original complaint and third amended complaint, appellant incorporated those statements in his pleadings. Appellant's declaration, also attached to the original complaint, took issue only with the statements that (1) he was ADA qualified and "declined" and (2) he was notified by letter to attend a pre-medical separation hearing. Appellant declared he did not decline to participate, but rather was "medically unfit," and he did not receive the letter notice to attend the pre-medical separation hearing. But he did not otherwise challenge the statement he was medically separated from MTA. We need not accept appellant's later contradictory attempts to claim he was terminated in retaliation for filing a workers' compensation claim. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383 (*Owens*).)

When a party files an amended complaint seeking to avoid the defects of a prior complaint either by omitting the facts rendering the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so we may disregard the inconsistent allegations and read the allegations of the superseded complaint into the amended complaint. (*Owens*, *supra*, 198 Cal.App.3d at pp. 383-384; see also *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 [courts may take judicial notice of earlier complaints and disregard

inconsistent allegations absent explanation for inconsistency]; *Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955 [allegations inconsistent with facts set forth in unambiguous written instrument incorporated by reference may be stricken].)[7]

D. Violation of Public Policy

To establish a claim for wrongful termination in violation of public policy, a plaintiff must prove: (1) an employer-employee relationship, (2) termination or other adverse employment action, (3) a nexus between the termination and the employee's engagement in protected activity, (4) causation, and (5) damages. (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2008) ¶ 5:10, p. 5-2 (rev. #1 2008), citing *Holmes v. General Dynamics Corp*. (1993) 17 Cal.App.4th 1418, 1426, fn. 8.) An employee may have a tort cause of action for wrongful termination in violation of public policy when he or she is discharged for "exercising . . . a statutory or constitutional right or privilege." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 454.) The viability of appellant's claim for violation of public policy under FEHA is tethered to the terms of the FEHA statute. (*Estes v. Monroe* (2004) 120 Cal.App.4th 1347, 1355.)

Appellant's claim for wrongful termination in violation of public policy is entirely dependent on the alleged violations of FEHA claimed in his first three causes of action. Because we conclude appellant has failed to state a claim for discrimination, harassment or retaliation under FEHA, his claim for wrongful termination in violation of public policy fails as well. The trial court therefore properly sustained MTA's demurrer to such cause of action.

---

[7] As the trial court informed appellant, "[t]he court . . . requires allegations of specific fact surrounding [the] termination, in order to clarify the allegations in the 'medical separation' letter attached to the original complaint. The court also requires that [appellant] plead in conformity with the declaration appended to the original complaint . . . or plead a satisfactory explanation for any inconsistencies." Appellant ignored these directions, and it must be presumed appellant had no ability to overcome these concerns.

E. Nonstatutory Claims

Appellant argues that the courts should employ a "substantial compliance" test to determine whether he has satisfied the Claims Act filing requirements as to his nonstatutory common law claims. The allegations of the second amended complaint, in which appellant attempted to assert such claims, do not address compliance with the Claims Act but simply recite that "[d]efendants . . . were appraised [*sic*] [of] the accident giving rise to the need for surgery . . . ." Such an allegation does not even remotely constitute any "substantial compliance" with the Claims Act.

With exceptions not pertinent here, Government Code section 945.4 provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . ." The Claims Act statutes are not simply "traps for the unwary," as appellant claims. To the contrary, the claim requirements serve to furnish a public entity with sufficient information to enable it to investigate and evaluate the merits of claims, assess liability, and, when appropriate, to settle claims without the expense of litigation. (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 732.) The substantial compliance doctrine applies only when there is a defect in form but the statutory requirements have otherwise been met. (*Id.* at pp. 732-733.) The doctrine does not apply when, as here, there is not even an attempt to comply with Claims Act requirements. (*Id.* at p. 733.)

Since appellant fails to allege compliance with the Claims Act, the trial court properly sustained the demurrer to his nonstatutory claims.

2. Leave to Amend

Ignoring the trial court's clear instructions, appellant failed to plead specific facts in the third amended complaint. As to his statutory claims, appellant simply elected to stand on the identical allegations set forth in the defective second amended complaint. Thus, he effectively chose not to amend his pleading after being given the opportunity to do so by the court.

"It is the rule that when a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can." (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 635, disapproved on another point in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 740; *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091 [failure to amend after leave granted]; see also *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 327 [no abuse of discretion in denying leave to amend when plaintiff fails to correct defects on basis of which special demurrers to previous complaint were sustained or as directed by court].) That appellant represents himself did not require the court to afford him further chances to amend. (*Taliaferro v. Prettner* (1955) 135 Cal.App.2d 157, 161.) Four opportunities are enough.

The trial court properly sustained MTA's demurrer to the third amended complaint without leave to amend.

DISPOSITION

The judgment is affirmed. Respondent is to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

MANELLA, J.*

---

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.